IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.158 OF 2005
IN
CHAMBER SUMMONS NO.1 OF 2005
IN
SUIT NO.574 OF 2004

Rasiklal Manikchand Dhariwal & Ors. ....Appellants
Ori.Plffs.

V/s.

Kishore Washwani & Anr. ....Respondents
Ori.Deft.

Mr.Aspi Chinoy, Senior Counsel with Mr.Arun Mohan, Mr.S.A. Diwan i/b Mulla & Mulla & C.B. & C. for the Appellants.

Dr.Virendra V. Tulzapurkar, Senior Counsel with Mr.Virag V. Tulzapurkar and Mr.H. Engineer i/b Gordhandas & Fozdar for Respondent No.1.

Mr.Iqbal Chagla, Senior Counsel with Mr.Janak Dwarkadas with Mr.V. Singh i/b Mr.G.S. Hegde for Respondent No.2.

CORAM : A.P. SHAH AND
S.J. VAZIFDAR, JJ.
DATED : 3RD MAY, 2005.

P.C. :

1. This is the Plaintiffs' Appeal against the order of the learned single Judge rejecting their Chamber Summons in so far as it relates to one of the amendments sought.

2. The suit is for a perpetual injunction

restraining the Defendants inter-alia from passing off their products bearing the mark "Malikchand" or any mark deceptively similar to the Plaintiffs' trade mark "Manikchand" and for other usual and consequential reliefs in a passing off action.

3. The Appellants filed the suit only against Respondent No.1. Pursuant to the impugned order Respondent No.2 has been impleaded as Defendant No.2. The Respondents have not challenged the same.

4. The suit was filed on 23rd February, 2004. In the plaint, it is specifically alleged that in or about 1961 one Rasiklal Manikchand Jain originally adopted and used his middle name "Manikchand" as a trade mark to be used in relation to goods including chewing tobacco and that since then the trade mark has been continuously and extensively used. The Plaintiffs sought to amend the plaint by substituting the year 1961 with the year 1958. The learned Judge rejected the Chamber Summons in so far as this amendment was concerned.

5. It is necessary at this stage to set out paragraphs 5 and 6 of the plaint and the proposed amendments thereto which have been rejected.

. Paragraphs 5 and 6 of the plaint read as under :-

> "5. The Plaintiffs state that in or about the year 1961, Shri Rasiklal MANIKCHAND Jain, who by a Gazette notification changed his last name "Jain" into "Dhariwal", (hereinafter referred to as "Karta of the HUF") originally, honestly and in a bonafide manner adopted and used his middle name "MANIKCHAND" as trade mark to be used in relation to Chewing Tobacco.
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> 6. The Plaintiffs were first in point of time to honestly and in a bona-fide manner to adopt, use and apply for registration of the trade mark "MANIKCHAND" in respect of the said goods including Chewing Tobacco. Since, its adoption in the year 1961 the trade mark "MANIKCHAND" is being used continuously, extensively."

6. The impugned order rejected the Appellants' Chamber Summons in so far as the amendments sought in items 5 and 6 of the schedule thereto are concerned. Items 5 and 6 read as under :-

> "5. After paragraph 4, add the following as new paragraphs, and number them 4A, 4B and 4C.
>
> 4A. In or about 1958, the Plaintiff No.1 for the first time honestly conceived of and adopted his middle name i.e. the name of his father i.e. "Manikchand" as a trade mark for use in relation to

tobacco products consisting of bidi and commenced using the same on a commercial scale.By so adopting the said trade mark in relation to tobacco products, the Plaintiff No.1 acquired proprietorship in the word mark "Manikchand". The Plaintiffs crave leave to refer to and rely upon the Excise Register recording the manufacturing and sale of the said products, when produced.

4B. Thereafter in or about 1961, the Plaintiff no.1 started manufacturing, marketing and dealing in chewing tobacco (Zarda) and used the same trade mark "Manikchand" in relation to the said chewing tobacco products.Thereafter i.e. since 1961, the Plaintiffs started selling openly exclusively and continuously their products namely "Manikchand Zarda" in the Districts of Poona, Ahmednagar, Satara, Kolaba, Kolhapur and the Union Territory of Goa. Having used the mark thus continuously as aforesaid from 1958 in relation to bidi products and from 1961 in relation to Zarda, the Plaintiffs on or about 22nd November, 1966 applied for registration of the trade mark "Manikchand Zarda" label and got the same registered under Registration No.238990 for chewing tobacco in Class 34 as of the said date. The said trade mark registration was limited to the Districts of Poona, Ahmednagar, Satara, Kolaba,Kolhapur and the Union Territory of Goa. Hereto annexed and marked Exhibit "AA2" is a copy of the advertisement of said application for registration in the Trade Marks Journal No.468 under application No.238990 in Class 34 showing use since 1961. The said trademark was last renewed with effect from 2.11.2001.

4C. Through inadvertence, however, in the original plaint, the

> Plaintiffs have stated that the trade mark "Manikchand" was adopted by the 1st Plaintiff in 1961. The Plaintiffs state that in fact the adoption of the said trade mark as evidenced by the aforesaid Excise Register relates back to the year 1958 in respect of bidis and that the same was also used in relation to other products viz. chewing tobacco (Zarda).
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> 6. In paragraph 6, delete "1961" and substitute the same with "1958".

7. Before dealing with the impugned judgment in so far as it rejected the Appellants' Chamber Summons to the extent indicated above, it is necessary to consider Mr.Chinoy's submission on behalf of the Appellants that it ought to be held that Respondent No.2 ought to be deemed to have been joined in this suit as on the date of the suit and not as on the date of the Chamber Summons for amendment. The submission was based on the proviso to Section 21 of the Limitation Act. Section 21 reads as under :-

> **"21. Effect of substituting or adding new plaintiff or defendant. -** (1) Where after the institution of a suit, a new plaintiff or, defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party :
>
> Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good

> faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.
>
> (2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff".

8. This submission was opposed both by Mr.Chagla and Mr.Virag V. Tulzapurkar, the learned counsel appearing on behalf of Respondent Nos.1 and 2 respectively on various grounds. They submitted that the suit as against Defendant No.2 is deemed to have been instituted only on the date of the amendment and not on the date on which the suit was filed. They submitted inter-alia that this was not a case of misdescription. Nor is it a case of the Appellant having sued Respondent No.1 instead of Respondent No.2. They based their submission or the fact that the Appellant had not sought to substitute Respondent No.1 with Respondent No.2 and had consciously chosen to sue both.

9. We do not however find it necessary to decide this point as the issue does not arise in an application for amendment for impleading Respondent

No.2. The question of exercising powers under the proviso to Section 21 of the Limitation Act does not arise in the facts of the present case. It is admitted that the suit as against Respondent No.2 is not barred by limitation. The question and purpose of exercising powers under the proviso to Section 21 would only arise in a case where a suit against a newly added party is barred or is likely to be barred by limitation. This is obvious as the provision is in the Limitation Act. The doubt if any is set at rest by Clause 20 of the Statement of Objects and Reasons which reads thus :-

> "Clause 20. - The existing section 22 is being amended so that an omission to implead a person owing to a bona-fide mistake does not deprive him of his rights against that person if the court is satisfied in that behalf."

10. The judgment of a Division Bench of this Court in the case of *Indian Bank versus M/s.Fuel Injections Ltd. & Ors. (1994) 1 Bom.C.R. 260* relied upon by Mr.Chinoy is of no assistance to him. The Appellants therein applied to delete the name of Ramesh Pallod from the cause title and to substitute the name of Kashinath Pallod carrying on business in the name and style of Messers. Bharat Agencies as the sole proprietor thereof. In the alternative, the

appellants prayed that they be allowed to amend the title of the plaint by deleting the words "Ramesh Pallod of Bombay Indian Inhabitant carrying on business in the name and style of thereby retaining only the firm name.

. It was contended in that case that the claim against Kashinath was barred by limitation since he was a new party being added for the first time to the suit and the period of limitation had expired. The Division Bench held that the suit would not be barred by limitation as by the amendment the appellants were merely seeking to correct a misdescription. However considering the facts of that case the Division Bench held that in any event i.e. even if the suit was barred by limitation, it was a fit case for exercise of power under the Proviso to section 21. It is in these circumstances, that the Division Bench made the observations in aragraph 15 of the judgment relied upon by Mr.Chinoy and which read as under :-

> "15. Even under section 21 of the Limitation Act, there is a Proviso which says that where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

> Looking to the circumstances set out above, this is also a fit case where, in any event, power can be exercised under the Proviso to section 21(1) of the Limitation Act and a direction can be given that the suit against Bharat Agencies shall be deemed to have been instituted on the original date of the suit, viz., 30th January, 1986."

11. It appears obvious to us that both Mr.Chinoy on the one hand and Mr.Chagla and Mr.Tulzapurkar on the other dealt with this point not in the context of any question of limitation but on the effect of such an order on an application under Section 10 of the Code of Civil Procedure in Suit No.8A of 2004 filed by Respondent No.2 before the District Court, Mandaleshwar, Madhya Pradesh.

. The effect of the learned single Judge allowing Respondent No.2 to be impleaded as Defendant No.2 to the suit in so far as it relates to the date on which the suit as against Defendant No.2 must be deemed to have been filed is a question which falls for consideration of the Court dealing with the application under Section 10 of the Code of Civil Procedure and not for the consideration of the Court granting the amendment. The suit against Defendant No.2 not being barred by limitation, we do not

consider ourselves called upon to exercise power under the proviso to Section 21 of the Limitation Act. We keep this question open.

12. This leaves for consideration the amendment sought in items 5 and 6 of the schedule to the Chamber Summons which we have reproduced above.

. Mr.Chagla and Mr.Tulzapurkar submitted that by the proposed amendments to paragraphs 5 and 6 of the Plaintiff the Plaintiffs have sought to deprive the Respondents of a valuable right which has vested in them viz. the admission that the Plaintiff has used the said mark only since 1961 and not prior thereto. They submitted that by virtue of the admission a valuable right under section 34 of the Trade Marks Act 1999, had vested in the Respondents.

13. Mr.Chinoy submitted that there was no admission on the part of the Plaintiff to this effect inasmuch as the statement was contained in the plaint and not in response to any assertion on the part of the Respondents relating to the period of user of the said mark. The submission is not well founded.

14. There is nothing in the Evidence Act

pertaining to the law of admission that suggests that to constitute an admission a statement must be in response to an assertion by the other party. The assertion of a fact irrespective of whether it was in response to an assertion to the contrary or qua an assertion on that aspect by another or otherwise is still an admission.

15. In support of their submission that the statement in paragraphs 5 and 6 of the plaint constitutes an admission to the above effect and therefore cannot be withdrawn by an amendment to the plaint the learned counsel appearing on behalf of the Respondents cited various judgements of the Supreme Court. They placed strong reliance in particular upon the judgements of the Supreme Court in *M/s.Modi Spinning and Weaving Mills Co. Ltd. And Another versus M/s.Ladha Ram & Co. (1976) 4 SCC 320, and Heeralal versus Kalyan Mal And Others (1998) 1 SCC 278.*

. For the purpose of this judgement we will presume that the admission is capable of being withdrawn. In other words we will presume that the above judgements of the Supreme Court do not lay down an absolute proposition to the effect that an

admission in pleadings can in no circumstances be withdrawn if the effect thereof would be to deprive the other side of taking advantage of the same. It is therefore not necessary for us to deal with the law on this aspect.

16. It is well established that an application for amendment must be bona-fide. It is necessary in the present case to examine whether the application for the said amendment is bona-fide or not. Mr.Chagla's submission that the Appellants have not established that the application for amendment was bona-fide is well founded.

17. What do we have before us to determine this question? The affidavit in support of the Chamber Summons offers no explanation whatsoever to establish that the application is bona-fide. In paragraph 11 it is merely stated that through "inadvertence" it was stated in the plaint that the trade mark was adopted by the Plaintiffs in 1961. It is also stated that the adoption of the trade mark in 1958 is evidenced by an excise register.

18. Bereft of any details or particulars we are left with the impression that the only reason that

motivated the present application for amendment was the 2nd Respondents two applications both dated 11th March, 2004 to the Registrar of Trademarks, Mumbai seeking to amend his Trademark Application Nos.717630 and 1229295 to predate the claim of user of the mark "Malikchand" to 1960 from 1992 and Respondent No.2 having within a week thereafter filed the Mandaleshwar suit.

. The Respondent's conduct / actions cannot form the basis of an amendment. Even assuming that the Respondents' application for changing the date of user to 1960 was not bona-fide the same can be of no relevance on the question of the date of first user of the trade mark by the Plaintiff. That is an independent question unconnected with the Respondents case so far as the date of user simpliciter is concerned.

19. It is not even suggested in the affidavit in support that this conduct of the Respondents led the Plaintiff's to make fresh inquiries which led to the discovery of the Plaintiffs having used their mark in 1958.

20. In certain cases such averments may well be

sufficient in support of an application for amendment. In the facts and circumstances of the present case however it was incumbent upon the appellants to have furnished some details of this alleged "inadvertence". The circumstances that we refer to are the proceedings filed by Respondent No.2 in the District Court Mandaleshwar, Madhya Pradesh.

21. On 16th March, 2004 Respondent No.2 filed Civil Suit No 8-A of 2004 in Mandaleshwar for a declaration that the Appellants do not have any right to sell the said goods under their trademark as it was allegedly deceptively similar to the trademark of Respondent No.2, for a perpetual injunction restraining the Appellants from dealing in articles under the said mark and for other consequential reliefs in a passing off action. The trial Court passed an ad-interim order of injunction against the Appellants. The Appellants application for setting aside the ad-interim injunction was rejected and the trial Court confirmed its earlier order. The High Court by an order dated the 11th May, 2004 dismissed the Appellants appeal against the order but directed the trial Court to conclude the trial of the suit expeditiously and finally dispose it off preferably within six months from the date of receipt of a copy

of its order. The Appellants challenged this order before the Supreme Court. The Supreme Court by its order and judgment dated 26th February, 2005, reported in (2005) 3 SCC 63, dismissed the Appellants' Appeal. It is not necessary to refer to the observations of the Supreme Court on merits for the purpose of this judgement. Suffice it to state that the Supreme Court dismissed the Appellants Appeal and directed the trial court to comply with the direction of the High Court and complete the trial of the suit in any event within six months from the date of the order.

22. It would thus be noted at this stage that the suit filed by Respondent No.2 in Madhya Pradesh is not only ripe for hearing but has been ordered by the Supreme Court to be disposed of within six months. We are not concerned here with the effect of any order that may be passed in an application under section 10 of the Code of Civil Procedure. That is a matter for that Court to decide and not for us. What is important to note is that at every stage of the proceedings in the Mandaleshwar suit the Appellant pleaded and proceeded on the basis that they used their said mark for the first time in the year 1961. In those proceedings, the Appellants merely contended that the documents relied upon by the Respondents are

manufactured and that they could not be relied upon. Both the Madhya Pradesh High Court and the Supreme Court held that prima-facie it could not be said that the said documents which established the Respondents' prior user since 1960 were forged or manufactured for the purpose of the litigation. It was held that these aspects would have to be decided at the trial, and that it would be premature to take a view on the contention thus raised by the Appellants. In fact in several other proceedings too the consistent stand of the Appellants was that they first used the said mark only in 1961.

23. The Appellant raised the plea of user since 1958 for the first time only in the above Chamber Summons i.e. after they failed at all stages in the interlocutory proceedings in the Mandaleshwar suit which spanned the period 16.3.2004 to 26.2.2005 (date of order of the Supreme Court.) The present Chamber Summons was filed on 3rd January, 2005. Respondent No.2, made the said application before we Registrar of Trademarks to predate its user from 1992 to 1960 one 11th March, 2004. Thereafter followed a series of applications in the Mandaleshwar suit filed by Respondent No.2, culminating in the order of the Supreme Court dated 25th February, 2005. It was only

after the Appellants failed in these proceedings, that they took out the present Chamber Summons on 3rd January, 2005 just over a month before the judgment was pronounced by the Supreme Court.

24. What is even more important to note is that no application has been made to amend the written statement in the Mandaleshwar suit to this effect. There is no explanation why the Appellant has made no application to amend the written statement in the Mandaleshwar suit which is now ripe for hearing. Nor is there any explanation why no application of any nature whatsoever has been made in the Mandaleshwar suit, or in the Madhya Pradesh High Court or even in the Supreme Court based on the alleged error of having stated the year 1961 instead of the year 1958 in respect of the first user of the Appellants said mark. This assumes even greater importance as the Appellants filed an application for amendment of their written statement in the Mandaleshwar suit but did not seek to amend the date of their user of the mark from 1961 to 1958.

25. In our view, in these circumstances, it was incumbent upon the Appellant to furnish details of when they discovered the error on their part in

mentioning the year 1961, who discovered the same and the circumstances in which the same was discovered.

26. Mr.Chinoy referred to the synopsis filed by Appellant before the Supreme Court. The first item alleges that the Appellant used its mark for the first time in 1958. It was therefore even more important for the Appellant to explain why despite the same it has made no application to date in the Mandaleshwar suit for amendment of its written statement to bring the said facts on record. There may well be a genuine explanation for the same. But no explanation has been furnished before us. We are neither inclined nor entitled to speculate on this issue on behalf of the Appellant.

27. We must clarify that we are not on the question of mere delay. If it was a question of mere delay we would have been inclined to grant the amendment for it is settled law that mere delay would not disentitle a party to amend its pleadings. We are on the question of the Plaintiff not having furnished any satisfactory reasons in support of the Chamber Summons, and to establish their bona-fides in respect of the application for amendment. Even assuming that it is for the other party to demonstrate a lack of

bona-fides rather than for the applicant to establish bona-fides we are of the view that in the above facts it was necessary for the Plaintiff to establish its bona fides which it has failed to do.

. It is also necessary for us to clarify in fairness to the Appellant that we have refused to interfere with the impugned order essentially on the ground that the appellant has furnished no satisfactory explanation why they did not move any application to amend their pleadings in the Mandaleshwar suit. It is the Mandaleshwar suit which is ripe for hearing. We are considering an application for amendment in the present suit which is nowhere near ready for hearing considering the backlog pending in this Court. The considerations in an application for amendment of the plaint before us and of the written statement in the Mandaleshwar suit, if one had been made, would be entirely different.

28. In the circumstances even assuming that it is open for the Appellant to withdraw or explain the admission, in the facts of this case, it would not be open for them to do so.

. The Appeal is therefore dismissed. There

shall however be no ordered as to costs.